U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0475 BLA

EDWARD HIGGINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELKHORN EAGLE MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 07/30/2018
	)	
FRONTIER INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher and Brian W. Davidson (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer/carrier.

Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05038) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on May 3, 2013.[1]

The administrative law judge initially determined that employer was properly designated as the responsible operator and that the Kentucky Insurance Guaranty Association (KIGA) is liable for the payment of benefits as a coverage guarantor. Considering entitlement, the administrative law judge credited claimant with nineteen years of underground coal mine employment, and found that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, she found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator.[3] The Director, Office of Workers' Compensation

[1] Claimant's initial claim for benefits, filed on October 10, 2002, was denied by the district director on April 18, 2003 by reason of abandonment. Director's Exhibit 1. Claimant took no further action until filing the instant claim on May 3, 2013. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Approximately eleven months after filing its brief in support of the petition for review, and six months after the briefing schedule closed, employer moved to remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. Employer's Motion at 1-5. Employer relies on *Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 (June 21, 2018), which held that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-2. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by

Programs (the Director), filed a limited response, urging the Board to affirm the administrative law judge's finding that claimant had one year of coal mine employment with employer and that KIGA is liable for this claim. Claimant has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To prove that a coal mine operator is a potentially liable operator, the Director must establish, among other things, that the operator employed the miner for a cumulative period of not less than one year.[5] 20 C.F.R. §§725.494(c), 725.495(b); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 329, 24 BLR 2-1, 2-15 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 F.3d 468, 475, 22 BLR 2-334, 2-344 (4th Cir. 2002). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal

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failing to raise it in its opening brief. We agree with the Director. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. *See Lucia*, 2018 WL 3057893 at *8 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 30.

[5] In addition to establishing that the miner worked for the operator for at least one year, the Director must also establish that the miner's disability or death arose out of employment with that operator; that the entity was an operator after June 30, 1973; that the miner's employment included at least one working day after December 31, 1969; and that the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e).

mine or mines for at least 125 'working days.'"[6] 20 C.F.R. §725.101(a)(32). In "determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id*. An unpaid leave of absence may also be counted towards the cumulative period of one year where there is no evidence that the employment was terminated and the record indicates that claimant retained the right to employment. *See Elswick v. New River Co*., 2 BLR 1-1109, 1-1113-14 (1980).

Employer does not dispute that the beginning and ending dates of claimant's employment, July 23, 1997 and August 3, 1998, when claimant stopped working due to a crippling work-related back injury, exceed one year.[7] Employer's Brief at 7; *see* Hearing Tr. at 30, 33; Director's Exhibit 28. Employer asserts, however, that the administrative law judge erred in counting the period from February 28, 1998 through March 30, 1998, when the Kentucky Department of Workers' Claims (KDWC) records reflect that claimant was off work due to a finger injury.[8] Employer's Brief at 8-10. Employer contends that because claimant was removed from employer's payroll and was instead receiving temporary total disability (TTD) benefits for "at least four weeks and three days," claimant did not work for employer for the requisite one year. *Id*. at 10.

Contrary to employer's contention, whether claimant was receiving TTD benefits instead of his regular wages through the company payroll does not determine whether the period of his absence from work can be counted towards the requisite year of employment with employer. Rather, as the Director correctly asserts, the issue is whether, during the period of his absence, claimant continued to have an employment relationship with employer. *See Elswick*, 2 BLR at 1-1113-14; *see also BGL Mining Co. v. Cash*, 165 F.3d 26 (Table), 1998 WL 639171 (6th Cir., Sept. 11, 1998); 65 Fed. Reg. 79920, 79959 (Dec. 20, 2000); Director's Brief at 2.

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[6] Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

[7] Claimant testified that on August 3, 1998 he was injured in a roof fall at work and was paralyzed from the waist down. Director's Exhibit 15 at 7, 9; Hearing Tr. at 30, 33.

[8] The Kentucky Department of Workers' Claims (KDWC) records show that claimant was injured on February 27, 1998 when his finger was caught between a roof bolt and a roof bolt machine. Director's Exhibit 28.

The administrative law judge found that there is no evidence that claimant was taken off the payroll to suggest that his employment relationship with employer stopped for any period between July 23, 1997 and his last day of work on August 3, 1998.[9] Decision and Order at 6. The administrative law judge noted that the record contains a December 11, 2002 document completed by employer indicating that claimant was off work from February 27, 1998 through May 15, 1998 because of a work-related injury.[10] Decision and Order at 5; Director's Exhibit 1. She further noted, however, that employer's document conflicts with the KDWC records which indicate that claimant was off work for his finger injury for a shorter period, from February 28, 1998 through March 30, 1998.[11] Decision and Order at 6; Director's Exhibit 28. Moreover, the administrative law judge noted that employer's document is internally inconsistent, in part because it indicates that claimant was not kept on the payroll while on leave for his injury, but also lists August 3, 1998, his last day of work, as the day he was taken off the payroll.[12] *Id*. at 6, *referencing* Director's

[9] As the Director notes, the administrative law judge used the term "on the payroll" as the equivalent of being in an employment relationship. Director's Brief at 2.

[10] The December 11, 2002 document additionally states that claimant began his employment with employer on July 23, 1997 and that the last day he performed any actual work was August 3, 1998. Director's Exhibit 1. It also notes that claimant's job was as a roof bolter operator, and states that Frontier Insurance Company provided federal workers' compensation coverage on August 3, 1998. *Id.*

[11] The administrative law judge also noted that employer's statement was on a form filled out "by Hugh (illegible)," and did not indicate what role the person signing the form had with the company or what records he reviewed prior to filling out the form. Decision and Order at 5-6.

[12] The December 11, 2002 documents contains a series of questions and answers. In response to Question #1, "Please list the exact dates of employment for [claimant] with your company," the person completing the form responded, "7-23-97 thru 8-3-98." In response to Question #2, "Was [claimant] ever injured on the job?," the person completing the form answered "yes." Question #2 continues, "If yes, was he on sick leave during his work for your company?," to which the person completing the form answered, "No. He was off for a work related injury 2-27-98 thru 5-15-98." Question #3 asks "If he was on leave, did your company keep him on the payroll during this leave?," to which the person completing the form responded "No". Question #3 continues, "If yes, did your company pay any form of compensation?," to which the person completing the form answered "Yes." Question #5 asks, "What insurance company provided your company with Federal workers' compensation coverage on the . . . last date [claimant] performed actual work?," to which the person completing the form responded "8-3-98 Frontier Ins. Company."

Exhibit 1. The administrative law judge found that these discrepancies "raise[d] a question" about whether the document's earlier statement that claimant was not kept on the payroll referred to the period after his August 3, 1998 catastrophic back injury, "rather than any period after the finger injury." Decision and Order at 6. Additionally, the administrative law judge noted that at the hearing and during an April 25, 2014 deposition, claimant consistently testified that following his finger injury he was off work for only a few days, not four weeks or more. Decision and Order at 6; Hearing Tr. at 34-36; Director's Exhibit 15 at 9.

Based on these findings, the administrative law judge permissibly determined that employer's document does not credibly establish that claimant was off work from February 27, 1998 through May 15, 1998 or, more importantly, that claimant's employment relationship with employer ended prior to August 3, 1998. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 6; Director's Exhibit 1. The administrative law judge also rationally found that even if the KDWC records accurately reflect that claimant was on TTD benefits for his finger injury from February 28, 1998 through March 30, 1998, they do not provide a basis to conclude that claimant's employment relationship with employer ended during that period.[13] Decision and Order at 6; Director's Exhibit 28. We therefore agree with the Director that the administrative law judge permissibly found that claimant's employment relationship

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Question #5 also asks "What insurance company provided your company with Federal workers' compensation coverage on . . . the date he was taken off your payroll as an employee?," to which the person completing the form similarly responded "8-3-98 Frontier Ins. Company." Director's Exhibit 1.

[13] Relying on *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 22 BLR 2-349 (6th Cir. 2002), employer argues that the administrative law judge erred in "speculat[ing] that [claimant] simultaneously received disability benefits while being kept on the payroll." Employer's Brief at 8. As the Director asserts, however, employer's reliance on *Hall* is misplaced. Director's Brief at 3. In that case, the court held that "speculation" regarding whether the claimant remained on the payroll was "not evidence that he was on the payroll." *Hall*, 287 F.3d at 563, 22 BLR 2-362. Contrary to employer's assertion, here the administrative law judge did not speculate that claimant remained on the payroll from February 28, 1998 through March 30, 1998. Employer's Brief at 8. Rather, the administrative law judge permissibly found that there is no credible evidence that claimant's employment relationship with employer was temporarily severed at some point before August 3, 1998.

with employer lasted more than one year.[14] *See Elswick*, 2 BLR at 1-1113-14; Decision and Order at 6; Director's Brief at 3.

Employer also argues that the administrative law judge erred by suggesting that, in the alternative, claimant could establish one year of employment simply because he worked 125 days with employer, without regard to whether that employment relationship lasted for a full calendar year. Employer's Brief at 10, *referencing* Decision and Order at 6. In so arguing, employer has taken the administrative law judge's statements out of context.

As the administrative law judge noted, the regulation provides that "[i]f the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, *it must be presumed, in the absence of evidence to the contrary*, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii) (emphasis added). The administrative law judge found that claimant was employed by employer for a cumulative period of more than one year. Decision and Order at 6. She then determined that claimant established that he worked 285 days in coal mine employment for employer during that year, based on his testimony that he worked five days a week and two Saturdays a month. *Id*. She concluded, therefore, that even if "the additional four weeks and three days included in the Kentucky records are discounted, the record would still establish 260 days of actual exposure, well over the 125-day requirement of actual exposure." *Id*.

Thus, there is no merit to employer's argument that the administrative law judge used the 125-day rule as a substitute for establishing a one year employment relationship. Employer's Brief at 10-11. Rather, the administrative law judge determined that claimant was employed by employer for more than a calendar year. 20 C.F.R. §725.101(a)(32). She then determined that claimant had at least 125 working days within that calendar year, regardless of whether his time off due to injuries was excluded from the calculation of "working days." *Id*. Employer does not contest the administrative law judge's finding that

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[14] The administrative law judge mistakenly stated that claimant worked for employer for a period of one year and six days, "from July 27, 1997, through August 3, 1998 . . . ." Decision and Order at 6. Elsewhere in her decision, however, the administrative law judge correctly noted that claimant's testimony and the documentary evidence reflect that he began working for employer on July 23, 1997, not July 27, 1997. Decision and Order at 5; Director's Exhibits 1; 14 at 21; Hearing Tr. at 33. Further, as the administrative law judge's error in stating that claimant began work for employer on July 27, 1997, rather than July 23, 1997, does not affect whether claimant had a cumulative year of employment with employer, it is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

claimant has more than 125 working days of coal mine employment with it. In view of the forgoing, we affirm the administrative law judge's finding that claimant was employed for a cumulative period of a year with employer, during which he worked in or around a coal mine for at least 125 days. *See Mitchell*, 479 F.3d at 329, 24 BLR at 2-15; *Martin*, 277 F.3d at 475, 22 BLR at 2-344.

Finally, employer argues that it is not properly designated as the responsible operator because it is not financially capable of assuming liability[15] because it and its insurance carrier, Frontier Insurance Company, are insolvent and the claim is not covered by KIGA.[16] Employer's Brief at 11-15. Employer asserts that the Kentucky Insurance Guaranty Association Act, which created KIGA, excludes claims for benefits arising under the Black Lung Benefits Act (BLBA) from coverage in two ways. Employer's Brief at 11-13. First, employer asserts, KIGA does not cover insurance claims on policies for "ocean marine insurance," which is defined to include coverage written in accordance with the Longshore and Harbor Workers' Compensation Act (Longshore Act). Employer's Brief at 13-15, *citing* KY Rev. Stat. Ann. §304.36-030(1)(f). Second, employer contends, KIGA excludes coverage where there is other insurance provided by, "or guaranteed by, any government or governmental agencies." Employer's Brief at 13-15, *citing* KY Rev. Stat. Ann. §304.36-030(1)(h). Employer contends that because the BLBA arises under the Longshore Act, and because the Black Lung Disability Trust Fund (the Trust Fund) guarantees benefits under the BLBA, this claim is excluded from coverage by KIGA and employer cannot be held liable for the payment of benefits. Employer's Brief at 15.

The administrative law judge properly rejected employer's argument. Decision and Order at 7-8. On September 29, 2017, after briefing in this case concluded, the Sixth Circuit issued *Island Fork Construction v. Bowling*, 872 F.3d 754, BLR (6th Cir. 2017). The court held that although the employer's insurer, Frontier Insurance, was insolvent,

[15] As previously discussed, a potentially responsible operator must be financially capable of assuming liability for the claim. 20 C.F.R. §725.494(e). An operator is deemed capable of assuming its liability if it "obtained a policy or contract of insurance . . . that covers the claim," unless "the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed." 20 C.F.R. §725.494(e)(1). It is employer's burden, as the designated responsible operator, to prove that it is incapable of assuming liability for the payment of benefits. 20 C.F.R. §725.495(b).

[16] As the administrative law judge noted, the Kentucky Insurance Guaranty Association (KIGA) covers claims under certain insurance policies, including those issued by Frontier Insurance Company, when the companies providing those policies become insolvent. Decision and Order at 7.

KIGA was responsible for the payment of benefits as a coverage guarantor. *Bowling*, 872 F.3d at 760. The court rejected the employer's argument that the "ocean marine insurance" exception in the KIGA Act applied to claims filed under the BLBA because the exception includes coverage written in accordance with the Longshore Act and any "other similar federal statutory enactment." *Bowling*, 872 F.3d at 759. While it acknowledged that the BLBA incorporated some of the Longshore Act's provisions, such as its judicial review procedures, the court explained that the BLBA was not "authorized" by the Longshore Act. *Id*. Moreover, the court noted that the BLBA explicitly does not incorporate the insurance provisions of the Longshore Act. *Id*. In addition, the court explained that there is no logic or precedent for reading a statute involving miners' benefits as involving "ocean marine insurance." *Id*.

The court also rejected the employer's argument that the KIGA Act's exception for any insurance provided by any government or governmental agencies applied to claims filed under the BLBA based on the role played by the Trust Fund in black lung claims. *Bowling*, 872 F.3d at 760. The court explained that the KIGA Act requires that a guaranty be in writing, be signed by the guarantor, and contain provisions that specify the amount of the maximum aggregate liability of the guarantor and the date that the guaranty terminates. *Bowling*, 872 F.3d at 759-60. Noting that the Trust Fund does not have contracts with insurance companies that provide coverage for black lung claims, the court held that the Trust Fund does not meet the "technical requirements" for a guaranty under Kentucky law. *Bowling*, 872 F.3d at 760. The court noted that the BLBA seeks to require private mine operators to pay benefits "to the maximum extent feasible," and only provides for the Trust Fund to assume liability when there is no operator that is liable for the payment of benefits. *Id*.

Employer concedes that *Bowling* controls this case. Employer's Brief at 11. We therefore affirm the administrative law judge's determination that employer is the responsible operator.[17]

[17] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge